

Dennis A. Winston (SBN 68049)  
DENNIS A. WINSTON,  
A PROFESSIONAL LAW CORPORATION  
12823 Dewey Street  
Los Angeles, California 90066  
Telephone: (310) 313-4300  
Facsimile: (310) 572-4622

Attorney for Petitioner/Plaintiff  
KEVIN CUMMINS

SUPERIOR COURT FOR THE STATE OF CALIFORNIA  
COUNTY OF SAN DIEGO, NORTH DISTRICT

KEVIN CUMMINS,

Petitioner and Plaintiff,

v.

CITY OF ENCINITAS, and DOES 1-10,  
Inclusive,

Respondents and Defendants

) CASE No. 37-2010-00058511-CU-PT-NC

) [Hon. Timothy M. Casserly, Dept. N-31]

) PETITIONER AND PLAINTIFF CUMMINS'  
) TRIAL BRIEF IN SUPPORT OF PETITION  
) FOR WRIT OF MANDATE TO COMPEL  
) DISCLOSURE OF PUBLIC RECORDS

) Trial Date: May 20, 2011

) Trial Time: 1:30 p.m.

) Hg Dept: N-31

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 (b) [¶] (1) **The people have the right of access to information concerning**  
3 **the conduct of the people's business, and, therefore, the meetings of public**  
4 **bodies and the writings of public officials and agencies shall be open to**  
5 **public scrutiny.**

6 (2) **A statute, court rule, or other authority, including those in effect on**  
7 **the effective date of this subdivision, shall be broadly construed if it**  
8 **furtheres the people's right of access, and narrowly construed if it limits**  
9 **the right of access.**

10 *Cal. Constitution, art. I, § 3(b).*<sup>1</sup>

11 In enacting this chapter, the Legislature, mindful of the right of individuals to  
12 privacy, finds and declares that **access to information concerning the**  
13 **conduct of the people's business is a fundamental and necessary right of**  
14 **every person in this state.**

15 *Government Code § 6250.*<sup>2</sup>

16 **1. INTRODUCTION AND SUMMARY OF ARGUMENT**

17 Petitioner and Plaintiff Kevin Cummins (“Cummins”) seeks a writ of mandate to  
18 compel Respondent and Defendant City of Encinitas (“City”) to produce public records  
19 concerning the condition and maintenance of public streets. The City refuses to produce the  
20 public records claiming that to do so would reveal what the City was thinking (the  
21 “deliberative process privilege”) in reporting to the City Council as to the condition of the  
22 City’s roads and which roads to repair.

23 The City cannot sustain *its* burden to prove that the “deliberative process privilege”  
24 *clearly outweighs* the public interest in ascertaining how and where the public’s funds are  
25 being spent. *CBS Broadcasting Inc. v. Superior Court* (2001) 91 Cal. App.4<sup>th</sup> 892, 908, 906  
26 (“*CBS Broadcasting*”)(“The burden of proof is on the proponent of nondisclosure, who must  
27 demonstrate a ‘*clear overbalance*’ on the side of confidentiality. [¶] [T]here is a clear and  
28 **legislatively articulated justification for disclosure--the right of the public and the press**  
**to review the government's conduct of its business.**”)

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1 Unless otherwise indicated, all emphasis supplied all internal quotation marks omitted.

2 Unless otherwise indicated, all further references to “sections” shall refer to the  
Government Code.

1 The deliberative process privilege is not absolute and does not establish such a clear  
2 overbalance on the side of confidentiality that it would prevent the public from obtaining a  
3 report by an outside consultant as to the condition of the City's streets. *Marylander v.*  
4 *Superior Court* (2000) 81 Cal. App.4<sup>th</sup> 1119, 1121 ("We hold the trial court erred, because  
5 the applicable [deliberative process] privilege is not absolute but conditional[.]")

## 6 **2. STATEMENT OF FACTS**

7 In this action that was filed on August 18, 2010, Petitioner Cummins, a resident of the  
8 City, seeks public records from the City subject to the California Public Records Act  
9 (*Government Code* § 6250, *et seq.*, the CPRA") (Verified Petition, ¶¶ 6-11; Declaration of  
10 Petitioner and Plaintiff Kevin Cummins For Trial ("Cummins Declaration"), ¶ 1; Petitioner's  
11 Appendix of Exhibits ("PA") Exhibits "A" and "B".) Specifically, in June 2010, Cummins  
12 made a demand of the City for the following public records:

- 13 \* all draft(s) of the City's street maintenance report produced by the City's  
14 current streets consultant and delivered to the city; and
- 15 \* all correspondence with the streets consultant since the submission of its  
16 draft report, including but not limited to the City's requested edits and changes  
to the draft report.

17 (Verified Petition, ¶ 6; City's First Amended Verified Answer To Petition For Writ Of  
18 Mandate ("First Amended Answer", PA Exhibit "C"), ¶ 6; Cummins Declaration, ¶ 3.)

19 Cummins' request for public records in connection with the street maintenance  
20 report— prepared by an independent consultant paid by the City for the City's use—prompted  
21 an exchange of correspondence between the City and Californians Aware ("CalAware," a  
22 nonprofit public interest group which assisted Cummins in making his request) in which:

23 CalAware clarified that what PETITIONER sought was referenced in the City  
24 Operating Budget, on page 4-161, as the "Pavement Management Plan or  
25 System" under "Major Work Projects: Engineering Services/Major Projects in  
26 the Next two years, Number 15." In response to PETITIONER'S clarification  
through CalAware, the City responded that the first document PETITIONER  
was referred to by the City as the "Pavement Management Report."

27 (Verified Petition, ¶ 7; First Amended Answer, ¶ 7.)  
28

1 The City denied Cummins' request for the public records concerning the condition of  
2 the streets, contending that disclosure of the consultant's report would disclose what the City  
3 was thinking since the City took the consultant's Pavement Management Report ("Report"),  
4 called it a draft, and worked with the consultant to make changes to the report that was  
5 ultimately the basis for street maintenance recommendations to the City Council. (Verified  
6 Petition, ¶¶ 7-11, 16; First Amended Answer, ¶¶ 7-11, 16; Cummins Declaration, ¶¶ 2, 4.)  
7 This action followed.

8 According to the City Of Encinitas City Council Agenda Report For Meeting Date:  
9 September 22, 2010 ("Agenda Report") prepared in connection with a public meeting of the  
10 City Council, (PA Exhibit "D"<sup>3</sup>), the City retained Nichols Consulting Engineers ("Nichols"),  
11 an independent consulting firm to develop a Pavement Management Program for the City to  
12 govern approximately \$2,800,000.00 in spending on public roads. (Agenda Report at 1, 3.)

13 Initially, Nichols studied the City's streets and provided the City with "several drafts"  
14 of its Report "to staff who reviewed [it] and made comments." (Agenda Report at 1.)  
15 Nichols provided the City with a "final" draft of the Report "at the end of March 2010." (*Id.*)  
16 However, City staff did not present the "final" draft to the City until September 2010  
17 "because of several factors" including "inadequate staffing" because of "maternity leave" and  
18 "retirement" and a focus on "high[er] priority" projects. (*Id.*)

19 **3. THE NICHOLS REPORT AND ANY WRITTEN COMMUNICATIONS**  
20 **BETWEEN THE CITY AND NICHOLS ARE PUBLIC RECORDS AND A WRIT**  
21 **SHOULD ISSUE TO REQUIRE THE CITY TO PRODUCE THEM**

22 **A. Cummins Seeks Public Records**

23 *Section 6252(e)* defines a public record as "any writing containing information  
24 relating to the conduct of the public's business prepared, owned, used or retained by any  
25 ...local agency." The City does not dispute (nor could it) that the documents Cummins seeks  
26 \_\_\_\_\_

27 <sup>3</sup> Since the Agenda Report was provided by City staff to the City Council members for a  
28 public meeting, the Agenda Report is a self authenticating public record. *Sections 6252(e);*  
*54957.5; Evidence Code §§ 1280, 1521, 1530.*

1 are owned and were used and retained by the City to prepare its Pavement Maintenance  
2 Program. (Agenda Report at 1.)

3 As for any written communications between City employees and Nichols, such public  
4 records would not be protected by the deliberative process privilege because *statements* made  
5 by government employees are not protected by the privilege and such statements to Nichols  
6 would constitute a waiver of any privilege in any event. *Section 6254.5*<sup>4</sup>; compare *City of*  
7 *King City v. Community Bank of Central California* (2005) 131 Cal. App. 4th 913, 944.

8 **B. The City Cannot Meet Its Burden To Prove That The City's Interest In**  
9 **Concealing Pubic Records Clearly Overbalances The Public's Right To Their Disclosure**

10 Openness in government is essential to the functioning of a democracy.  
11 "Implicit in the democratic process is the notion that **government should be**  
12 **accountable for its actions. In order to verify accountability, individuals**  
13 **must have access to government files. Such access permits checks against**  
14 **the arbitrary exercise of official power and secrecy in the political**  
15 **process."** (*CBS, Inc. v. Block* (1986) 42 Cal.3d 646, 651 [230 Cal. Rptr. 362,  
16 725 P.2d 470], fn. omitted.) In adopting the [CPRA], the Legislature declared  
17 that "access to information concerning the conduct of the people's business is a  
18 fundamental and necessary right of every person in this state." (§ 6250.) As the  
19 result of an initiative adopted by the voters in 2004, this principle is now  
20 enshrined in the state Constitution: "**The people have the right of access to**  
21 **information concerning the conduct of the people's business, and**  
22 **therefore, ... the writings of public officials and agencies shall be open to**  
23 **public scrutiny."** (*Cal. Const., art. I, § 3, subd. (b)(1).*)

24 *International Federation of Professional and Technical Engineers, Local 21, AFL-CIO v.*  
25 *Superior Court* (2007) 42 Cal.4<sup>th</sup> 319, 328-329.

26 The government bears the burden of proving the overarching need for nondisclosure  
27 of public records. *CBS Broadcasting*, 91 Cal. App.4<sup>th</sup> at 908 ("The burden of proof is on the  
28 proponent of nondisclosure, who must demonstrate a '*clear overbalance*' on the side of  
confidentiality."); *County of Santa Clara v. Superior Court* (2009) 170 Cal.App.4<sup>th</sup> 1301,

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29 <sup>4</sup> "Notwithstanding any other provisions of the law, whenever a state or local agency  
discloses a public record which is otherwise exempt from this chapter, to any member of the  
public, the disclosure shall constitute a waiver of the exemptions specified in Sections 6254,  
6254.7, or other similar provisions of law."

1 1321 (“Since disclosure is favored, **all exemptions are narrowly construed**....[Citations  
2 omitted.] The agency opposing disclosure bears the burden of proving that an exemption  
3 applies.”)

4 A member of the public may request public records based solely upon “idle curiosity.”  
5 *Marylander*, 81 Cal. App.4<sup>th</sup> at 1125. However, as the courts have recognized, “the motive of  
6 the particular requester is irrelevant; the question instead is whether disclosure serves the  
7 public interest.” *County of Santa Clara*, 170 Cal.App.4<sup>th</sup> at 1324. “If the records sought  
8 pertain to the conduct of the people's business there *is* a public interest in disclosure.” (*Id.*;  
9 emphasis in original)

10 Here, Cummins’ (and the public’s) interest is based upon far more than idle curiosity.  
11 The City proposes to spend approximately \$2.8 million to repair and maintain City streets.  
12 The public has a legitimate and overriding interest in how, where and why the City decides to  
13 spend public funds. *CBS Broadcasting Inc.*, 91 Cal. App.4<sup>th</sup> at 906 (“[T]here is a clear and  
14 **legislatively articulated justification for disclosure--the right of the public and the press**  
15 **to review the government's conduct of its business.**”); *CBS, Inc. v. Block* (1986) 42 Cal.3d  
16 646, 651 (“*Block*”). The courts of this state have consistently affirmed the public’s right to  
17 public records illuminating how the government conducts its business (particularly when  
18 deciding to spend public funds) in a wide variety of situations.

19 In *Los Angeles Unified School District v. Superior Court* (2007) 151 Cal. App. 4th  
20 759 (“*LAUSD*”), the court of appeal affirmed the trial court’s issuance of a writ compelling  
21 LAUSD to produce public records concerning the construction of a high school. The City of  
22 Long Beach and its district attorney sought records, “[b]ecause the City expects that the  
23 **school will have an impact on traffic**, fire, and police services in its neighborhoods  
24 ....[Petitioners] asked for the production of 40 categories of documents, including **all**  
25 **correspondence between LAUSD and appointed and elected officials** of the City of  
26 Carson **relating to site selection, location, and construction of the proposed high school,**  
27 **as well as copies of all projected busing patterns and busing studies related to the**  
28 **project.**” *LAUSD*, 151 Cal.App.4<sup>th</sup> at 763.

1 In *County of Santa Clara*, the court of appeal affirmed the trial court's order  
2 compelling the county to disclose its Geographic Information System (GIS) basemap  
3 compiled and created by the county from information submitted to or generated by the  
4 county.<sup>5</sup> The court held that "the County failed to "demonstrate a *clear overbalance* on the  
5 side of confidentiality" (*County of Santa Clara*, 170 Cal.App.4<sup>th</sup> at 1329), even in the face of  
6 the county's professed security concerns in identifying the location of sewers and "sensitive  
7 information that is not publicly available, such as the exact location of Hetch Hetchy reservoir  
8 components." (*Id.* at 1327.)

9 In *State Board of Equalization v. Superior Court* (1992) 10 Cal.App.4<sup>th</sup> 1177, the  
10 court of appeal affirmed the trial courts issuance of a writ for public records reflecting how  
11 the State Board applied the law. *Id.*, at 1181 ("This case concerns secret law. It arises on a  
12 writ of review of a judgment, issued under the [CPRA] which directs the State Board of  
13 Equalization (Board) to disclose ...documents (from which confidential taxpayer information  
14 has been excised) which show the Board's practice in interpreting and applying Sales and Use  
15 Tax Regulations.") The trial court had ordered disclosure of:

16 copies of all records maintained by the Principal Auditor's Office regarding the  
17 history and current interpretation of Sales and Use Tax Regulations 1660 and  
18 1667, including copies of all Tax Counsel's letter opinions concerning said  
19 regulation issued through the date of [the] request. The request specified that  
20 **such records should include all documents relating to Regulations 1660**  
21 **and 1667 upon which the Board's audit staff would rely or be able to rely,**  
22 **in the process of interpreting and applying these regulations** including ...  
23 all Tax Counsel's opinions ...; **internal memorandum ...; the decisions ... that**  
24 **constitute the preliminary hearing officer's reports on audit protests ...;**  
25 **replies to taxpayer inquiries** ... and training materials or other matter  
26 intended for the guidance of the audit staff.

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27 <sup>5</sup> As described to the court: "GIS is an information management technology that  
28 combines computer mapping and database technologies to improve the management and  
analysis of location based information. Among the essential geographic elements of the GIS  
basemap are parcels, streets, assessor property information, jurisdictional boundaries,  
orthophotos [aerial photographs], and buildings [¶] The GIS Basemap starts with the  
Assessor's map data, and builds layers of information onto it. The GIS Basemap is a computer  
mapping system that (1) tells the hardware where to gather information from a variety of  
separate databases and (2) tells the hardware how to intelligently render the various bits of  
data into a structured output format." *County of Santa Clara*, 170 Cal.App.4<sup>th</sup> at 1309 n1.

1 *State Board of Equalization*, 10 Cal.App.4<sup>th</sup> at 1185.

2 In identifying the overriding public interest in disclosure, the court of appeal observed:  
3 “Here, the public interest in disclosure is substantial, the manifest public interest in the  
4 avoidance of secret law and a correlative interest in the disclosure of an agency's working  
5 law.” (*Id.*, at 1190.)

6 In *Connell v. Superior Court* (1997) 56 Cal.App.4<sup>th</sup> 601, 617, the court of appeal  
7 affirmed the lower court’s issuance of a writ compelling the state controller to produce  
8 records as to unpaid state warrants. (“As the superior court correctly concluded, **the records**  
9 **pertain to the government's conduct in managing public revenues.**”)

10 In *Uribe v. Howie* (1971) 19 Cal. App. 3d 194, the petitioner sought production of  
11 monthly pesticide spraying reports submitted to the state Department of Agriculture. (*Id.*, at  
12 200)(“the reports show the name of the commercial operator, the location and owner of the  
13 grove, vineyard or other crop being sprayed, the date of application, the number of trees or  
14 acres treated, the kind of trees being treated, pests being treated for, the type of pesticide,  
15 including combinations of one or more pesticides and strength used, the dosage of each  
16 pesticide material used, and the amount of each concentrated pesticide material used in each  
17 application.”) The documents requested were “public records within the meaning of the  
18 [CPRA].” *Uribe*, 19 Cal.App.3d at 204.

19 Beyond peradventure, the Nichols Report and the City’s communications with Nichols  
20 concerning the Nichols Report involving the condition of City streets are public records which  
21 concern how the government conducts its business with the public’s funds. The public’s  
22 interest in obtaining these documents far exceeds any legitimate governmental interest in  
23 keeping them secret.

24 **C. The Deliberative Process Privilege Does Not Prevent Disclosure Of The**  
25 **Nichols' Report Or Communications Between The City And Nichols**

26 As applied by the California Supreme Court *prior to the adoption of Prop 59 in 2004*  
27 (*Cal. Constitution, art. I, § 3(b)*) the deliberative process privilege was intended to ensure the  
28 flow of information (usually of a personal nature) to a governmental agency (for example,



1 protecting the *blanket* disclosure of the Governor’s appointments calendar or the submissions  
2 by applicants for appointments to government positions). *Times Mirror Company v.*  
3 *Superior Court* (1991) 53 Cal. 3d 1325; *California First Amendment Coalition v. Superior*  
4 *Court* (1998) 67 Cal. App. 4th 159, 164.

5 As pertinent here, the privilege is based upon *Section 6255* (the public interest  
6 exception). *Section 6255* provides:

7 The agency shall justify withholding any record by demonstrating that the  
8 record in question is exempt under express provisions of this chapter or that **on**  
9 **the facts of the particular case** the public interest served by not making the  
10 record public *clearly outweighs* the public interest served by disclosure of the  
11 record.

12 *Michaelis, Montanari & Johnson v. Superior Court* (2006) 38 Cal. 4th 1065, 1071 (“[T]his  
13 provision contemplates a case-by-case balancing process, with the burden of proof on the  
14 proponent of nondisclosure to demonstrate a *clear overbalance* on the side of  
15 confidentiality.”)

16 The deliberative process privilege is not absolute, but must be applied on a case by  
17 case basis, and has **not** been applied to prevent public scrutiny of government spending on  
18 public projects. *Marylander*, 81 Cal. App.4<sup>th</sup> at 1121, 1128 (“We hold the trial court erred,  
19 because the applicable [deliberative process] privilege is not absolute but conditional [.] [¶]  
20 Not every disclosure which hampers the deliberative process implicates the deliberative  
21 process privilege. Only if the public interest in nondisclosure *clearly outweighs* the public  
22 interest in disclosure does the deliberative process privilege spring into existence.”)

23 *Michaelis* provides a useful analogy for this case. The issue there was whether the  
24 government had to produce the *losing* bids on a public works project. In *Michaelis*, our  
25 Supreme Court recognized the public interest in reviewing the *entire* bidding process.  
26 *Michaelis*, 38 Cal.4<sup>th</sup> at 1073 (“We agree that the competitive bidding process is intended to  
27 assure a healthy degree of competition, to guard against discrimination, favoritism, or  
28 extravagance, and to assure the best social, environmental, and economic result for the public.

[Citations omitted.] Accordingly, **the public may have a legitimate and substantial interest in scrutinizing the process leading to the selection of the winning proposal.**")

The Supreme Court ruled that the losing bids for an airport project were public records and had to be disclosed, but that disclosure could wait until after the deadline for submitting bids had passed and the negotiating process had ended. *Michaelis*, 38 Cal.4<sup>th</sup> at 1077.

Here, by analogy, the Nichols Report was submitted to the City in March 2010 and the final report by the City was submitted to the City Council for action in September 2010. (Agenda Report at 1.) There is no "**clear overbalance**" to justify nondisclosure of the Nichols Report and the City's communications to Nichols at this time to counter the public's "legitimate and substantial interest in scrutinizing the process leading to the selection of" which streets to repair. *Michaelis*, 38 Cal.4<sup>th</sup> at 1073.

There remains a legitimate public interest in reviewing "the government's conduct in managing public revenues [.]'" *Connell*, 56 Cal.App.4<sup>th</sup> at 617. Production of the public records sought here upholds the "right of the public and the press to review the government's conduct of its business." *CBS Broadcasting Inc.*, 91 Cal.App.4<sup>th</sup> at 906; *Block*, 42 Cal.3d at 651.

The City cannot sustain its burden to prove that the deliberative process privilege should be applied here to prevent disclosure of public records to assist in determining the basis upon which the government spends public funds. *Connell*, 56 Cal. App.4<sup>th</sup> at 618 ("[T]he records pertain to the government's conduct in managing public revenues. [¶] [T]he public interest demands the ability to verify. Only in this way can the public be certain, for example, that there is not a conspiracy of silence about outstanding warrants so that the payees are lulled into inaction until the warrants are canceled.")<sup>6</sup>

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<sup>6</sup> Although the City (correctly) did not expressly rely on the CPRA provisions covering public records that constitute "drafts" of documents (*Section 6254(a)*), out of an abundance of caution, Cummins points out that *Section 6254(a)* only covers drafts that are **not** retained by the public agency which the City does not contend here. Moreover, *Section 6254(a)* would require the City to prove the same overbalance of the need for nondisclosure as required to justify application of the deliberative process privilege. (*Id.*) Finally, the clear public interest in reviewing public records to monitor ongoing public responsibilities has long been

1 One need only look to this state's experience with the cloak of secrecy used to shield  
2 government spending abuses in Bell and Vernon, California, to understand the importance of  
3 public scrutiny of how the government conducts its business and the bases upon which the  
4 government spends the public's funds. The City's residents (as are all Californians) are  
5 entitled to hold government accountable for its spending decisions, but to do so the public  
6 must have the information found in public records to "scrutinizing the process leading to"  
7 those decisions. *Michaelis*, 38 Cal.4<sup>th</sup> at 1073.

#### 8 **4. CONCLUSION**

9 For the foregoing reasons, the Court should grant Cummins' request for a writ of  
10 mandate compelling the City to produce all public records called for in Cummins' CPRA  
11 request.

12 Dated: April \_\_, 2011

DENNIS A. WINSTON,  
A PROFESSIONAL LAW CORPORATION

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16 By \_\_\_\_\_  
17 Dennis A. Winston, Attorney for  
18 Petitioner/Plaintiff Kevin Cummins  
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recognized. *Citizens For A Better Environment v. Department Of Food And Agriculture*  
(1985) 171 Cal. App. 3d 704, 707.

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF SAN DIEGO  
NORTH COUNTY

CITY OF ENCINITAS  
RISK MANAGEMENT

MINUTE ORDER

2011 MAY 31 AM 10:22

DATE: 05/24/2011

TIME: 01:38:00 PM

DEPT: N-31

JUDICIAL OFFICER PRESIDING: Timothy M. Casserly

CLERK: Trish Dietrich

REPORTER/ERM: Not Reported

BAILIFF/COURT ATTENDANT:

CASE NO: 37-2010-00058511-CU-PT-NC CASE INIT.DATE: 08/18/2010

CASE TITLE: Cummins vs. City of Encinitas

CASE CATEGORY: Civil - Unlimited CASE TYPE: Petitions - Other

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APPEARANCES

The Court, having taken the above-entitled matter under submission on 5-20-11 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

The court issues the following ruling in the writ of mandate of Petitioner Kevin Cummins ("Petitioner") against Respondent City of Encinitas (the "City"):

Petitioner's request for judicial notice is granted.

Petitioner's objection regarding the declaration of Mayer Jim Bond is overruled.

Petitioner's writ of mandate to compel disclosure of public documents is granted.

Petitioner seeks a writ of mandate to compel the City to produce public records pursuant to the California Public Records Act ("PRA"). The parties do not dispute that the subject documents constitute public records. The records concern the condition and maintenance of public streets and the City denied the request to produce the records, claiming protection under the deliberative process privilege.

Initially, Petitioner requested (1) all drafts of the City's street maintenance report produced by the City's current streets consultant and delivered to the City, and (2) all correspondence with the streets consultant since the submission of its draft report, including but not limited to the City's requested edits and changes to the draft report.

The requested documents were clarified as what is referred to in the City's Operating Budget on pages 4 – 161 as the "Pavement Management Plan or System" under "Major Work Projects: Engineering Services/Major Projects in the Next two years, Number 15." The City identified the document sought as the "Pavement Management Report" (the "Report"). The City retained Nichols Consulting Engineers ("Nichols") to help develop a Pavement Management Program for the City by monitoring pavement conditions of the City's streets and document the maintenance history of the streets. The Report was the result of collaboration of the City's staff and Nichols. The Report speaks to the condition of the

streets and includes recommendations on street maintenance and repair. Petitioner seeks the drafts leading to the final Report submitted to the City Council for review.

The PRA permits anyone to obtain, subject to certain exemptions, "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." Gov.C. § 6252 (e). The PRA was designed to provide "every person in this state" with access to such information. Gov.C. § 6250. Such access has been described as "a fundamental and necessary right." *Michaelis, Montanari & Johnson v. Sup.Ct. (City of Los Angeles)* ("Michaelis") (2006) 38 Cal.4th 1065, 1071.

The PRA allows a public agency to withhold information by demonstrating that the public interest served by nondisclosure "clearly outweighs" the public interest served by disclosure. Gov.C. § 6255; *Michaelis*, 38 Cal. 4th at 1071; *Wilson v. Sup.Ct. (Los Angeles Times)* ("Wilson") (1996) 51 Cal. 4th 1136, 1144. To determine whether this "catch-all" exemption applies, a case-by-case balancing process is required. The burden of proof is "on the proponent of nondisclosure to demonstrate a clear overbalance on the side of confidentiality." *Michaelis*, 38 Cal.4th at 1071. The privilege has three policy bases:

First, it protects creative debate and candid consideration of alternatives within an agency, and, thereby, improves the quality of agency policy decisions. Second, it protects the public from the confusion that would result from premature exposure to discussions occurring before the policies affecting it had actually been settled upon. And third, it protects the integrity of the decision-making process itself by confirming that "officials should be judged by what they decided, not for matters they considered before making up their minds."

*Times Mirror Co. v. Superior Court* ("Times Mirror") (1991) 53 Cal.3d 1325, 1351-52. "The key question in every case is whether the disclosure of materials would expose an agency's decision-making process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions." *Id.* at 1342.

Here, Petitioner states his interest is based on the fact that "[t]he City proposes to spend approximately \$2.8 million to repair and maintain City streets. The public has a legitimate and overriding interest in how, where and why the City decides to spend public funds." (Pet. Brief at 6.) Further, Petitioner seeks to understand the time lapse between the completion of the Report and its presentation to the City Council. "If the records sought pertain to the conduct of the people's business there is a public interest in disclosure." *County of Santa Clara v. Sup. Ct.* (2009) 170 Cal. App. 4th 1301, 1324. With regard to existing authority, this court finds the request in this case most analogous to the requests for records where the appellate court has found a public interest in disclosure. See *Los Angeles Unified School District v. Superior Court* (2007) 151 Cal. App. 4th 759, 763 [affirmed trial court's issuance of a writ compelling production of records concerning the construction of a high school because the city expects the school will have an impact on traffic, fire, and police services in its neighborhoods]; see *County of Santa Clara*, 170 Cal. App. 4th at 1329 [affirmed trial court's issuance of a writ compelling the county to disclose its geographic information system basemap compiled and created by the county from information submitted to or generated by the county]; see *Connell v. Superior Court* ("Connell") (1997) 56 Cal. App. 4th 601, 617 [affirmed the trial courts issuance of a writ compelling the state controller to produce records as to unpaid state warrants as they pertain to the government's conduct in managing public revenues]. The process by which recommendations are made on the maintenance and repair of city streets to be paid for by public funds, certainly pertains to the conduct of the people's business, and there is therefore, a public interest in disclosure. See *County of Santa Clara*, 170 Cal. App. 4th at 1324.

The City argues the release of the Report drafts would discourage candid discussions between the City and its consultant, create false public expectations and public confusion, and result in the expenditure of limited staff resources. The City states the decision-making process which the City and Nichols utilized to create the Report drafts involved their joint analysis of the City's needs regarding street maintenance, funding options available for street maintenance, and its experience concerning long-term performance of the City's streets. The City provides evidence that the Report was a collaborative effort between the City and Nichols, not an independent evaluation by Nichols. (Hefner Dec., ¶ 4.) According to the City, any factual errors found in the Report could be taken as true. (Hefner Dec., ¶ 6.) The City argues that such potential erroneous information will lead to public mistrust and confusion as well as waste limited staff resources by having to respond to numerous phone calls and e-mails about the corrections. (Oppo. at 7.) This case, however, is analogous to Michaelis. The California Supreme Court reviewed whether the government should be compelled to produce losing bids on a public works project. The Court recognized the public interest in reviewing the bidding process in its entirety. Michaelis, 38 Cal. 4th at 1073. "We agree that the competitive bidding process is intended to assure a healthy degree of competition, to guard against discrimination, favoritism, or extravagance, and to assure the best social, environmental, and economic result for the public. [Citations omitted.] Accordingly, the public may have a legitimate and substantial interest in scrutinizing the process leading to the selection of the winning proposal." Id. Following the Supreme Court's analysis in this case, the citizens in the City of Encinitas may have a legitimate and substantial interest in scrutinizing the process leading to the finalized reports and recommendations regarding the maintenance and repairs of their city streets. It is insufficient to offer the final Report for the people to understand the process by which final recommendations were reached.

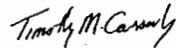
The deliberative process privilege has supported the public interest in nondisclosure in some circumstances. "Disclosing the identity of persons with whom the Governor has met and consulted is the functional equivalent of revealing the substance or direction of the Governor's judgment and mental processes; such information would indicate which interests or individuals he deemed to be of significance with respect to critical issues of the moment. The intrusion into the deliberative process is patent." Times Mirror, 53 Cal. 3d at 1343. Further, compelled disclosure might discourage some from meeting with the Governor, devaluing or eliminating their viewpoints from consideration. Id. at 1344. The public interest of a democratic society in knowing how the Governor performs his or her duties was "clearly outweighed" by the public interest in nondisclosure of the appointment records. Later cases have followed the Times Mirror rule. See Rogers v. Superior Court (1993) 19 Cal.4th 469, 479 [telephone numbers of persons with whom city council members spoke were exempt from disclosure under deliberative process privilege, as they would reveal "judgment and mental processes" of members]; Wilson, 51 Cal. App. 4th at 1143 [applications submitted to Governor for position on county board of supervisors were pre-decisional documents coming within deliberative process privilege; application forms solicited personal information, which would not be supplied if confidentiality were not respected]; San Joaquin County Local Agency Formation Com. v. Superior Court (2008) 162 Cal. App. 4th 159, 170 [where rejected applicant to local agency formation committee noticed taking of depositions of commissioners to learn what extra-record information they had when they denied application; trial judge erred in only partially granting Commission's motion for protective order because information sought fell under deliberative process privilege].

While there is no authority directly on point, the cases denying requests based on the deliberative process privilege appear far more distinguishable from this case than those compelling disclosure. After an analysis of the City's position, it is unclear how the release of the resulting Report would negatively affect its decision-making process as the request was made only after the process was complete. See Michaelis, 38 Cal. 4th at 1073. Regarding the City's concern regarding the burden of future requests

should Petitioner's request be granted, the Supreme Court has already declared that such concerns are without merit as a case-by-case analysis is required when making determinations on such requests. See Connell, 56 Cal. App. 4th at 616. Any negative public reaction or confusion from potential, not confirmed, errors in the drafts are speculative and do not clearly outweigh the public interest in disclosure. Id. at 613. This case greatly differs from the case law discussed in which the deliberative process privilege has been upheld and the City has provided little to analogize this case with this existing authority. As the City has not shown the court how its analysis of street conditions, street maintenance, and funding options would thwart "creative debate and candid consideration," confuse the public, or attack the "integrity of the decision-making process," the court is not convinced that these are the types of judgments and mental processes meant to fall within the deliberative process privilege. See Times Mirror, 53 Cal.3d at 1351-52.

The City explains that the City and Nichols worked closely to prepare the Report and needed to analyze street conditions based on field survey data obtained, street age, previous maintenance, levels of service, funding options, distress placed upon the street and then formed the basis of the joint conclusions as to the most appropriate street maintenance methods to use. (Hefner Dec., ¶ 7.) The court finds no clear overbalance to justify nondisclosure of the Report drafts to counter the public interest. The City, therefore, has not met its burden to demonstrate a clear overbalance on the side of confidentiality against the public's interest in the process by which street maintenance recommendations are finalized and the management of public funds. See Michaelis, 38 Cal.4th at 1071.

**IT IS SO ORDERED:**



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Judge Timothy M. Casserly

